is applied. See *Carter* v. *Ferguson*, 58 Hun (N. Y.) 569; *Duff* v. *Russell*, 60 N. Y. Super. Ct. 80; affirmed 133 N. Y. 678. Arguing for the moment from Lumley *v.* Wagner as a basis, Dean Ashley advances the novel proposition that under the theory of that case no difference should be made between a great and an obscure actor, on the ground that men differ as much as land. The truth of this statement may well be doubted; from a practical standpoint a manager rarely attaches importance to the individuality of his "supers." But granting that the argument might apply were the question of enforcing a contract for personal service open, it is of no weight in the case of a negative agreement: for the damages are manifestly adequate, because nominal, unless the actor is of sufficient ability to attract patrons to his new manager to the affirmative harm of the plaintiff.

Of course, negative as well as affirmative contracts will not be enforced, even after a *prima facie* case has been made, if unfairness would result. But to argue that because of such possible unfairness an injunction should never issue in negative contracts is practically to argue that no specific performance of affirmative contracts should ever be granted. There is some force in the suggestion that Lumley *v.* Wagner on its special facts exhibits a lack of mutuality, but this objection would be present only in a limited class of cases, and involves considerations independent of the general question as to enforcing negative agreements. To avoid the injustice apparent in Montague *v.* Flockton, the injunction should always be conditional on the plaintiff's continuing willingness to perform his part of the contract. It is interesting to note that, as the writer includes within the class wherein he would permit enforcement of negative covenants cases where the affirmative cause is still executory, though unbroken, he is obliged, in order to avoid the destruction of his distinction if later a breach should occur, to make the injunction conditional on the continuing performance of both parties. This gives the curious result that under the rule advocated the defendant could get out of performing his negative covenant by simply breaking his affirmative agreement also.

MIXED QUESTIONS OF LAW AND FACT; THE FALSE PASSPORTS CASE.— A novel case, the importance of which has perhaps been overlooked, was decided by the King's Bench last year. *Rex* v. *Brailsford*, [1905] 2 K. B. 730. The defendants, A and B, had by combination obtained from the English Foreign Office a passport, which, though ostensibly for B, was in fact intended for C's use in Russia. An indictment was framed charging A and B with acts "tending to the public mischief." The court, as matter of law, held correct a ruling by the trial judge that the acts tended to public mischief. The dangers of the decision are emphasized in a recent article. *The False Passports Case*, by Herman Cohen, 22 L. Quar. Rev. 34 (Jan., 1906). It is urged that it is anomalous to withdraw from the jury an essential averment of the indictment, such as the lengthy argument shows this clause to be. A general verdict must of necessity always involve a question of law and fact; if the admitted facts are capable of two views, the jury must decide between them. An exception to the general rule existed formerly in libel cases, which afford an analogy to the present question. In such cases the judge used to say, "Prove what the defendant said, and I 'll tell you whether he is guilty of libel"; to-day Lord Alverstone says, "Prove what the defendant did, and I 'll tell you whether his acts constitute public mischief." Fox's Libel Act (1792), supposedly declaratory legislation, in giving a jury the power of bringing in a general verdict of guilty or not guilty upon the whole matter put in issue before them, made the procedure in libel similar to that in other crimes. The jury are as capable of judging whether certain acts tend to the public mischief as whether certain writing holds a man up to hatred, ridicule, or contempt. Though a judge in theory probably has the power to pass upon a new combination of circumstances, provided in so doing he follows principles already established, yet to attempt now

to exercise this power "would place the bench in an invidious position." The Lord Chief Justice is in effect creating a new indictable offense; this may well be regarded as a grave political danger. Finally, it is questioned whether the acts done did tend to public mischief in England. If the fraud became general, international complications might ensue; but the remedy should be by statute.

Perhaps the inquiry whether the acts done did tend to public mischief may be divided into four steps: (1) What acts were done, as a simple question of fact; (2) How great was the tendency towards public mischief; (3) How great a tendency is necessary to make the acts criminal within the law; (4) Is the tendency to public mischief found in the actual case as great as that necessary to make the acts criminal. *Cf. Mixed Questions of Law and Fact*, by Frederick Green, 15 HARV. L. REV. 271, 274. The first two questions are clearly of fact, while the third is a rule of law. The intense struggle over the jury's right to bring in a general verdict in libel cases is evidence of the practical importance of the question, who shall apply the law to the fact. As in the case of notice of dishonor of a bill of exchange, such acts as those under discussion become from time to time the subject of more specific legal rule or definition. Mr. Cohen seems right in his contention that if the decision of the Lord Chief Justice is correct, the latter is in fact, by way of judicial legislation, adding a new crime to the criminal calendar, — that of obtaining a passport intending it for the fraudulent use of another. The right of the judge so to do is unquestioned. 3 STEPHEN, HIST. CR. LAW 352; MARKBY, ELEMENTS, LAW, 5th ed., § 30; *cf.* 2 AUSTIN, JURISPRUDENCE 668. But the law created by such action must always be open to the specific objections of concreteness, incoherency, lack of comprehensiveness, and of its being *ex post facto* with regard to the case where it is first applied. 2 AUSTIN, JURISPRUDENCE 671; 2 STEPHEN, HIST. CR. LAW 359.

INTERNATIONAL LAW AS PART OF THE MUNICIPAL LAW. — Public international law, as distinguished from municipal law, is the body of rules which control the conduct of independent states in their relations to each other. It is a disputed question whether international law, as thus defined, can properly be called law, if Austin's statement be accepted that law is a command imposed by a sovereign and enforced by a physical sanction. See 18 HARV. L. REV. 476. Whatever view may be taken as to the nature of international law when it is applied to disputes between independent states, there is no question but that its rules are law in the strictest sense in the courts of both England and the United States in cases in which private litigants are interested. It has long been held in such cases that the principles of international law are a part of the common law, recognized and applied whenever necessary to work out the rights of private parties. A creditor's attachment against the ambassador of a foreign power is invalid at common law, because international law gives diplomatic representatives immunity from such proceedings. *Triquet* v. *Bath*, 3 Burr. 1478. It is a crime at common law for a subject to violate the duty of neutrality imposed on his sovereign by the rules of international law. *Gideon Henfield's Case*, Whart. St. Tr. 49. These cases and others illustrating the same principle are cited by Mr. J. Westlake in a recent article. *Is International Law a Part of the Law of England?*, 22 L. Quar. Rev. 14 (Jan., 1906).

Mr. Westlake points out that an exception to the general rule that courts administering municipal law will, in proper instances, apply the rules of international law, has been established in England within a year. See *West Rand Central Gold Mining Co.* v. *Rex*, [1905] 2 K. B. 391. In that case relief was denied to the plaintiff, a British subject, who alleged, through a petition of right, that an obligation rested upon the English Crown, as successor to the South African Republic, to pay him for gold commandeered by that republic before it was annexed to England. It seemed to be admitted that international law would have put England under a duty to repay the gold if it had belonged